Saddleback Ridge Wind, LLC // Natural Resource Protection Act (NRPA) and Site Location of Development Act applications

- Licensee Response to the merits of the appeal

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January 10, 2012

FEDERAL EXPRESS

Board Chair Susan M. Lessard
c/o Terry Dawson
Board of Environmental Protection
#17 State House Station
Augusta, ME 04333-0017

Re: Patriot Renewables Saddleback Ridge Wind, LLC's Response to Appeal
Department Orders: L-25137-24-A-N, L-25137-TG-B-N

Dear Chair Lessard:

Enclosed please find the Response to Appeal by Licensee Saddleback Ridge Wind, LLC including an accompanying Appendix of Exhibits. Thank you for your consideration of these materials.

Sincerely,

Gordon R. Smith

GRS/prf
Enclosures
cc: Peggy Bensinger, Assistant Attorney General (w/encs.)
Cynthia S. Bertocci, BEP Executive Analyst (w/encs.)
Mark Margerum (w/encs.)
Rufus Brown, Esq. (w/encs.)

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STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION

Saddleback Ridge Wind, LLC	)	
Carthage, Canton and Dixfield	)	**RESPONSE TO APPEAL BY**
SADDLEBACK RIDGE WIND PROJECT	)	**LICENSEE SADDLEBACK RIDGE**
L-25137-24-A-N (Approval)	)	**WIND, LLC**
L-25137-TG-B-N (Approval)	)	

Licensee Saddleback Ridge Wind, LLC ("SRW") hereby responds to the appeal of the above-captioned order ("Department Order") filed by the Friends of Maine's Mountain ("FOMM") and several individuals (collectively "Appellants").

INTRODUCTION

The Appellants claim that the Department of Environmental Protection (the "Department") failed to conduct an adequate review of SRW's application to construct a 12-turbine expedited wind energy development (the "Project") with elements located in the towns of Carthage, Canton and Dixfield, Maine. Specifically, the Appellants claim that the Department made erroneous conclusions regarding the Project's potential sound, health and scenic impacts, as well as purported errors related to the Project's demonstration of tangible benefits. On the contrary, the Department's determination that the Project complies with all applicable laws and regulations is based upon a comprehensive ten-month review process and is conclusively supported by the record. Furthermore, Appellants' claims regarding the Project's sound impacts have been exhaustively debated and rejected in four prior appeals to the Board and three appeals to the Law Court. Appellants' noise claims were also the subject of the detailed, months-long Chapter 375(10) rulemaking recently completed by the Board. As discussed below, the information related to potential sound and visual impacts that SRW submitted to the Department has been confirmed by independent, expert peer reviews as well as inter-agency consultation. All of the Appellants' claims were addressed by SRW, the Department, sister state agencies, and

third-party experts during the comprehensive permitting process that included voluminous public comment and extended over four months beyond the statutory processing deadline. As a result, the Board should uphold the Department's order and deny the request for a public hearing on the appeal.

PROCEDURAL BACKGROUND

A. Project Overview

The Project is a 33-megawatt (MW) wind energy facility with elements located in Carthage, Canton and Dixfield, Maine. See Project Map attached as Exhibit 1. The Project will consist of 12 General Electric 2.75-103 turbines, each with a rated capacity of 2.75 MW. Each turbine tower is 85 meters tall (approximately 279 feet) from the ground to the center of the hub, and turbines will have a maximum 103-meter rotor, resulting in a maximum height from the ground to the tip of a fully extended blade of 136.5 meters (approximately 448 feet).[1] See Department Order at 1-2.

The Project includes construction of an approximately 1.7-mile access road from Winter Hill Road to the ridgeline of Saddleback Mountain, and a 1.8-mile access road along the ridgeline that will connect the wind turbines. The Project will interconnect to the electric grid via an approximately 8-mile above- and below-ground 34.5-kilovolt electrical line running from the Project to the Ludden Lane Substation in Canton, Maine. The electrical line will be routed along Winter Hill Road, Route 2, and across private land. See Department Order at 2-4.

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[1] SRW's permit application proposed using General Electric 2.75-100 turbines. As SRW noted in its original application to the Department, GE was about to make a modified noise-reducing blade design available for this turbine and SRW expected to modify its application to incorporate the noise-reducing blades when they became available. On March 17, 2011, SRW notified the Department of its intent to use turbines with the new blade design, the GE 2.75-103, and submitted revised application sections to reflect the new noise-reducing blades.

The closest non-participating residence will be 2,446 feet from a turbine, and the next closest residence will be 2,993 feet from a turbine. Six residences will be between 3,000 and 3,500 feet from the closest turbine. Three residences will be between 3,500 and 4,000 feet from the closest turbine. All other residences will be over 4,000 feet from the closest turbine. See Department Order at 10.

The entire Project area is located on land currently utilized for commercial forestry operations. The Project area, including all new roads, turbine pad sites, the operations and maintenance building, and parking areas, will create approximately 10.9 acres of new developed area. The Project will not result in any impacts to inland waterfowl and wading bird habitats, deer wintering areas, or other habitats for any rare, threatened or endangered species.

B. Department Review Process

SRW submitted an application to the Department on October 26, 2010 for permits to construct the Project pursuant to the Natural Resources Protection Act and the Site Location of Development Act. The application was accepted as complete for processing by the Department on November 15, 2010. On December 10, 2010, FOMM and other interested parties submitted a request for a public hearing on the application. The request was accompanied by voluminous comments related to sound, visual and other impacts. After reviewing the request and supporting material for six weeks, the Department concluded that a public hearing was not warranted. See Letter from Acting DEP Commissioner James Brooks to Rufus Brown, Jan. 21, 2011 (attached as Exhibit 2). In its letter to FOMM the Department stated:

> Your request has been considered carefully; however, much of the information you have submitted has been considered by the Department in previous applications and to the extent that you have submitted new information I find that it is not sufficient to warrant a public hearing. As such, a public hearing is not appropriate.

On March 10, 2010, in lieu of a public hearing the Department held a public meeting pursuant to 38 M.R.S.A. § 345-A(5). The meeting was held in the auditorium of Dirigo High School in Dixfield, and was attended by over 100 interested parties who submitted comments and asked questions of Department staff and the Department's sound and visual experts, Warren Brown and James Palmer. Department Order at 4.

The Department's review of the Project spanned over ten months and included extensive consultation with sister state agencies (e.g. Department of Inland Fisheries and Wildlife, Department of Marine Resources, Bureau of Public Lands, Department of Transportation, Historic Preservation Commission, Public Utilities Commission, and the Natural Areas Program) and third-party experts who had been specifically retained pursuant to 38 M.R.S.A. § 342(10) to provide technical input on Project impacts. See Department Order at 4. Because the Project meets the statutory definition of an expedited wind energy development, the Department was required to complete its review of the project within 185 days from the date the application was deemed complete. See 38 MRSA § 344(2-A)(A). As noted above, SRW's application was deemed complete on November 15, 2010. Accordingly, the statutory deadline for the Department's determination was May 19, 2011 (185 days from completeness determination). In fact, the Department did not complete its review of the Project until October 6, 2011, almost a year after the application was submitted and 140 days beyond the statutorily-imposed deadline. This additional review period assured that the Department had ample time to fully consider all Project impacts.

During the review process, the Department received numerous comments from FOMM, including comments regarding the Project's Noise Impact Study prepared by board certified acoustical engineer Ken Kaliski of Resource Systems Group ("RSG"). See RSG Noise Impact

Study for Saddleback Ridge Windfarm, October 2010 (attached as Exhibit 3). All of these comments were addressed by SRW and thoroughly reviewed by the Department. On December 2, 2010, FOMM posed questions relating to parameters and calculations used in the sound model. See email from Rufus Brown to Eric Ham, Dec. 2, 2010. On December 20, 2010, SRW provided a response to the Department answering FOMM's request. See Memorandum from RSG to Andy Novey, December 20, 2010 (attached as Exhibit 4). In addition, FOMM submitted two critiques of the Project's noise impact assessment, one by Rick James of E-Coustic Solutions and another by Robert Rand and Stephen Ambrose. On February 23, 2011, SRW submitted a detailed response to these concerns. See Memorandum from RSG to Andy Novey, Feb. 23, 2011 (attached as Exhibit 5). SRW also submitted an amended noise impact study prepared by RSG to reflect the change to new noise-reducing turbine blades. See RSG Noise Impact Study for Saddleback Ridge Windfarm, Revised March 2011 (attached as Exhibit 6).

As part of its review, the Department hired independent acoustical consultant Warren Brown of EnRad Consulting ("EnRad") to review SRW's noise impact assessment. EnRad conducted a peer review of SRW's noise impact assessment, including a review of the Project's CadnaA sound model, all materials submitted by FOMM, and the corresponding responses by SRW. See Department Order at 9-10. In its peer review, EnRad concluded that the Project's noise impact assessment was "reasonable and technically correct according to standard engineering practices and the Department Regulations on Control of Noise (06-096 CMR 375.10)." See Saddleback Ridge Wind Project – Noise Impact Study Peer Review, January 21, 2011 (attached as Exhibit 7).

FOMM also submitted comments regarding purported health effects related to wind power facilities. The Department reviewed FOMM's submissions as well as relevant public

health literature, including a report by the Maine Center for Disease Control ("MCDC"). See Department Order at 10. In July 2011 Dr. Dora Mills, former head of the MCDC, submitted testimony in the Board's recent Chapter 375(10) rulemaking process. Dr. Mills updated her previous assessment of the potential health effects of wind turbine noise, concluding that "there is no credible scientific evidence at this time supporting directly caused health problems, diseases or syndromes resulting from wind turbines that are in compliance with Maine's regulations and current modeling strategies." See Department Order at 10. Furthermore, the Department considered two recent scientific literature reviews relating specifically to wind turbine sound and health effects, and found that "compliance with Chapter 375 §10 is likely to ensure that there are no adverse health effects due to the proposed project." See Department Order at 10-11.

To assess potential scenic impacts, the Department hired independent visual consultant Dr. James Palmer of Scenic Quality Consultants to review SRW's visual impact assessment ("VIA"), which, in addition to photosimulations, included the results of a survey of hikers on Mount Blue in Mount Blue State Park on Labor Day weekend 2010. See Saddleback Ridge Wind Project Visual Impact Assessment by Terrence J. DeWan & Associates, October 2010 (attached as Exhibit 8); Department Order at 16-17. As part of his review, Dr. Palmer visited the Project site with SRW visual consultant Terry DeWan on December 2 and 3, 2010. In addition, Department staff also conducted site visits on December 3, 2010 and September 16, 2011. In the course of Dr. Palmer's evaluation of the accuracy of SRW's photosimulations, he requested additional information regarding the data and methodology used in the visual impact assessment, which SRW provided. On December 9, 2010 Alan Stearns of the Maine Bureau of Public Lands requested information regarding scenic impacts on locations within Mount Blue State Park. On December 10, 2010 FOMM submitted a critique of SRW's visual impact assessment, prepared by Michael Lawrence Associates ("MLA"). On January 14, 2011 SRW submitted responses to

the Alan Stearns request and the FOMM submission related to scenic impacts. See VIA Supplement prepared by Terry DeWan and Associates, Jan. 13, 2011 (Attached as Exhibit 9). Dr. Palmer considered all of this material in his review of the Project's visual impact assessment. On January 21, 2011, Dr. Palmer completed his review, and submitted written evaluations of both the Project's visual impact assessment and the MLA critique. See Department Order at 17. Dr. Palmer concluded that the VIA was "accurate and clearly presented" and that the Project would not result in an unreasonably adverse impact on scenic resources of state or national significance. Palmer Report at 51.

After its review of the information on visual impacts, the Department arrived at the following conclusion:

> Based on the information presented in the VIA, the design of the proposed project, the applicant's user survey, review comments from Scenic Quality Consultants, the comments submitted by interested persons including the MLA report, and in consideration of the evaluation criteria pursuant to 35-A M.R.S.A. § 3452(3), the Department finds that the applicant has made reasonable accommodation to fit the development into the natural environment and that no aspect of the project will have an unreasonable adverse effect on the scenic character, or existing uses related to scenic character of scenic resources of state or national significance, or other existing uses in the area.

Id. at 23.

On September 27, 2011, the Department issued a draft order approving the Project. In response to the draft order FOMM reiterated concerns about the Project's sound level assessment and visual impact assessment, which the Department reviewed and responded to. See Department Order at 16, 22-23. On October 6, 2011, the Department issued its order approving the Project. On November 7, 2011, Appellants filed the instant appeal with the Board. As noted

above, the Department's scrutiny of SRW's application spanned more than 10 months, over four months longer than the processing period provided for by statute.

DISCUSSION

I. THE DEPARTMENT PROPERLY DETERMINED THAT THE PROJECT COMPLIES WITH ALL APPLICABLE STATUTORY AND REGULATORY VISUAL IMPACT STANDARDS

Appellants' objections to the evaluation and conclusions regarding the Project's potential visual impacts are unfounded and are based on a misreading of the applicable review criteria. SRW prepared a comprehensive visual impact assessment ("VIA") of the Project's visibility and demonstrated that the Project will not have an unreasonable adverse impact on scenic character or existing uses related to scenic character, as required by the Department's permitting standards.

The VIA is supported by user intercept surveys (i.e. field surveys asking users of the Project area how they would react to views of the Project) as an additional source of data for evaluating the Project's compliance with regulatory standards. Such intercept surveys are not required by law but were conducted by SRW to strengthen the VIA's conclusions regarding scenic impacts. The Department also retained an outside expert to peer-review the applicant's work and to assess visual impacts. That expert, Dr. James Palmer, similarly concluded that the Project complied with the applicable visual impact standard. See Review of the Saddleback Ridge Mountain Wind Project Visual Impact Assessment by James F. Palmer, January 21, 2011 ("Palmer Review") at 51 (attached as Exhibit 10). None of Appellants' arguments undermine the finding of compliance in SRW's comprehensive VIA, the independent finding of compliance by the Department's expert visual consultant, or the finding of compliance ultimately made by the Department itself. The Department's determination that the Project will not have an unreasonable adverse impact under the applicable regulatory criteria is supported by extensive record evidence.

A. Regulatory Structure: The Wind Energy Act Establishes Specific Review Criteria for Scenic Impacts of Expedited Wind Energy Developments

The Legislature determined that wind energy development "is unique in its benefits to and impacts on the natural environment [and] makes a significant contribution to the general welfare of the citizens of the State," and that, given the realities of constructing grid-scale wind power projects, there are going to be necessary, but acceptable, visual impacts. 35-A M.R.S.A. § 3402(1). As a result, the Legislature has established a focused scope of review using a defined methodology that applies to expedited wind energy developments such as the Project.

Pursuant to the Wind Energy Act, the scope of review for impacts to scenic character is limited to expressly identified "scenic resources of state or national significance," and seeks to determine whether a proposed project "significantly compromises views" from these resources "such that the development has an unreasonable adverse effect on scenic character or existing uses related to scenic character" of these resources. Id. § 3452(1). Unlike scenic impact analyses for other types of development, the Wind Energy Act provides a specific set of standards for assessing scenic impacts to the identified resources. Those standards require that the Department consider the significance of the potentially affected scenic resource, the character of the surrounding area, the expectations of the typical viewer, the extent, nature and duration of potentially affected public uses of the scenic resource, and the potential effect of views of the turbines on the public's continued use and enjoyment of the resource. Id. § 3542(3).

The Wind Energy Act further states that "[a] finding . . . that the development's generating facilities are a highly visible feature in the landscape," is not by itself a "sufficient basis for a determination that the proposed wind development has an unreasonable adverse effect on scenic character or existing uses related to scenic character." Id. Additionally, there is a

presumption that visual impacts to areas beyond three miles from the Project are less significant and do not require a visual impact assessment. Id. § 3542(4).

B. The Department's Conclusions Regarding Visual Impacts on Scenic Resources Are Amply Supported by the Permitting Record

The VIA provides a comprehensive analysis of the Project's impacts on scenic resources. Although only required to address impacts to scenic resources of state or national significance within a three-mile radius of the Project, SRW identified all scenic resources of state or national significance within an eight-mile radius of the Project and evaluated visual impacts on all of those resources with potential views of the Project. See Department Order at 18; VIA at 5-6. For each such resource, the VIA identifies its significance, evaluates public uses and viewer expectations, project impacts and potential effects on public uses. Id. Additionally, the VIA provides viewshed maps showing areas of potential visibility as well as photosimulations to illustrate the Project's visibility at scenic resources. See VIA Viewshed Maps A-E and Appendix B. In his review of the VIA, Dr. Palmer concluded that the "VIA correctly identifies all state or nationally significant scenic resources based on the Wind Energy Act's standards." Palmer Review at 52.[2]

Because it can be difficult to quantify the extent of public use of a resource and, importantly, user expectations, particularly with respect to scenic quality, SRW took the additional step of conducting user intercept surveys to address several of the evaluation criteria in the Wind Energy Act. The summit area of Mount Blue in Mount Blue State Park was selected as the survey location because the park is a significant scenic resource and all of the Project's

[2] Dr. Palmer also independently reviewed the critique of SRW's visual impact assessment that was prepared by Michael Lawrence Associates ("MLA") and submitted by FOMM. See Review of the Saddleback Ridge Wind Project, Carthage, Maine: Wind Facility-Visual Quality and Scenic Character Report ("MLA Report") by James F. Palmer, January 21, 2011(attached as Exhibit 11). Dr. Palmer's review calls into question the understanding of relevant regulatory standards, accuracy, technical competence and completeness of the FOMM-submitted MLA Report. Id.

turbines will be visible from the summit. The results of the intercept surveys are set forth in the September 2010 Research Report by Market Decisions included as Appendix C of the VIA. Importantly, most respondents thought that views of the Project would have no effect on their use and enjoyment of Mount Blue. VIA at 22; Intercept Surveys Report at 1; Palmer Review at 42. The surveys were conducted over a holiday weekend with clear, sunny weather to maximize the number of respondents, and the methodology was approved in advance by the Department's visual expert. Intercept Surveys Report at 2; Palmer Review at 34-35 ("This study provides unique information directly relevant" to the Project). In fact, several of the hikers surveyed noted that they would react positively toward views of the Project because of its long-term environmental benefits. Palmer Review at 35.

SRW agrees with Dr. Palmer that the number of respondents was limited (itself an indication of the relatively limited use of the resource). The survey results, however, constitute an additional piece of information that supports the conclusions reached by two visual experts that the Project's visual impacts comply with the standards established by the Wind Energy Act.

In addition to the work done by SRW, Dr. Palmer prepared a comprehensive report that evaluated the VIA and independently evaluated the Project's impact on scenic resources. He prepared viewshed maps, visualizations, and identified the number of turbines visible from each of the scenic resources. See generally Palmer Review at Table 5 (turbine visibility), Appendix 1 (viewshed maps), and Appendix 2 (visualizations). Dr. Palmer also independently evaluated the Project's visual impact on each scenic resource within the statutory viewshed according to the Wind Energy Act evaluation criteria. Palmer Review at Table 8. Dr. Palmer concluded that the Project's visual impacts would be low-to-medium on three scenic resources, low on one scenic

resource, nonexistent-to-low on three scenic resources, and nonexistent on all remaining scenic resources. Id. Such impacts are consistent with what is allowed under the Wind Energy Act.

In summary, the VIA prepared on behalf of SRW, coupled with user intercept surveys from one of the scenic resources with the greatest potential visual impact and the analysis and conclusions of the Department's independent visual expert, demonstrate that the Project will not have an unreasonable adverse impact on scenic character or existing uses related to scenic character.

As discussed below, Appellants' arguments regarding visual impacts provide no basis for the Board to set aside the Department's conclusion that the Project complies with all applicable permitting requirements.

C. The Department Correctly Determined that the Wind Energy Act Excludes Consideration of Scenic Impacts to Webb Lake

Appellants claim incorrectly that the Wind Energy Act requires the Department to consider the Project's impacts to Webb Lake, despite the fact that such consideration of impacts to Webb Lake is excluded by statute. See Appellants' Brief at 26-28. As discussed above, in the review of an expedited wind energy development such as the Project, only impacts to statutorily-designated resources of state or national significance are considered. Webb Lake, as Appellants acknowledge, is not a statutorily-designated scenic resource for the purpose of review under the Wind Energy Act. Appellants' Brief at 23.

Even so, Appellants argue that impacts to Webb Lake should be considered because use of the lake is related to the use of Mount Blue State Park, which is a statutorily-designated scenic resource of state significance. This argument is based on an attenuated and incorrect reading of the Wind Energy Act. The Act states that the reviewing authority (i.e. the Department) must determine whether a wind energy project will have "an unreasonable adverse effect on the scenic

character or existing uses related to scenic character of the scenic resource of state or national significance." 35-A M.R.S.A. § 3452(1). The clearest, most straightforward reading of this requirement is that it regulates impacts to uses of the designated scenic resource, and does not, as Appellants' claim, regulate impacts to the use of areas related to the use of the designated scenic resource.

A close reading of the statutory language in question is instructive:

> In making findings regarding the effect of an expedited wind energy development on scenic character and existing uses related to scenic character . . . the primary siting authority shall determine . . . whether the development significantly compromises views from a scenic resource of state or national significance such that the development has an unreasonable adverse effect on the scenic character or existing uses related to scenic character of the scenic resource of state or national significance.

Id. (internal citations omitted). Thus, the Legislature has required consideration of two types of impacts: 1) effects on scenic character of the scenic resource of state or national significance; and 2) effects on existing uses related to the scenic character of the scenic resource of state or national significance. The first inquiry examines impacts to scenic character; the second inquiry examines impacts to existing uses related to scenic character. In both cases the impacts under review are solely those that affect the scenic resource of state or national significance. No logical reading of this language can support the Appellants' claim that the Department is required to assess scenic impacts to uses in areas adjacent to, but excluded from, statutorily designated scenic resources.

Appellants' arguments regarding the analysis of visual impacts to Webb Lake were raised, duly considered and rejected during the Department's review of the Project. The Department concluded that "the fact remains that Webb Lake is not on the list [contained in the Maine's Finest Lakes Study] and that is the statutory criteria established in the Wind Energy

Act." Department Order at 22. This determination was corroborated by Dr. Palmer, the Department's independent visual expert, who found that "the VIA correctly identifies all state or nationally significant scenic resources based on the Wind Energy Act's standards." Palmer Review at 52.

Appellants further claim incorrectly that "the Applicant's VIA excludes consideration of these related existing uses." Appellants' Brief at 27. Despite the fact that, as discussed above, there is no regulatory requirement to consider impacts to Webb Lake, the VIA explicitly does discuss such impacts, both in the VIA's description of impacts to water resources and in the inclusion of photosimulations of Project visibility from the surface of Webb Lake near Mount Blue State Park. See VIA at 12 and Appendix B at 7-10. Indeed, there is no indication, and Appellants do not suggest, that even if visual impacts to Webb Lake were included in the Department's determination, such impacts would be so significant as to alter the overall finding that the Project complies with the statutory visual standard.

Accordingly, Appellants' claim that the Department erred by excluding assessment of scenic impacts to Webb Lake is without merit and should be denied.

D. The Department Properly Assessed the Potential Scenic Impact of the Project's Associated Facilities

The Appellants claim that the project's VIA did not adequately address scenic impacts of the project's transmission lines and other associated facilities (i.e. roads, substation, and operations and maintenance building), but fail to identify any regulatory requirement that has not been met. The Appellants likewise fail to identify any significant scenic impact unaccounted for by SRW and the Department.

1. The Department Properly Considered Transmission Line Visibility

The Appellants argue that the VIA does not sufficiently assess the visibility of the Project's transmission line.[3] Appellants' Brief at 28-29. Yet the VIA explicitly states that "the transmission line will not be visible from any scenic resource of state or national significance." VIA at 9. Appellants acknowledge as much. Appellants' Brief at 29. To the extent that Appellants attempt to raise questions about the transmission line's visual impacts beyond the 8-mile study area around the turbines, such questions have no relevance to the Department's determination because "there is no state or nationally significant scenic resource within this additional area." Palmer Review at 52. Furthermore, the transmission line, consisting of poles that average approximately 50 feet in height with a handful of poles up to 70 feet tall, is located within undeveloped and actively logged forestland with tree canopy heights that are 40 to 50 feet tall. VIA at 9, 12; SRW Site Law Application, Oct. 26, 2010, at Exhibit 2. The transmission line will have minimal or no visibility from areas that are unregulated by the Wind Energy Act's scenic impact criteria, and, as discussed above, will have no visibility whatsoever from regulated scenic resources of state or national significance. Accordingly, Appellants' complaints regarding transmission line visual impacts are without merit.

2. The Department Properly Reviewed the Project's Associated Facilities

Appellants claim that the Department erred by not making a determination regarding the visual impact standard to be applied to the Project's associated facilities. Appellants' Brief at 30-34. The Department has discretion to determine that an expedited wind energy development's associated facilities are of such an unusual scope, scale or location that they

[3] The Project's "transmission line" is a 34.5-kV collector line, which is similar to distribution lines throughout Maine. With poles averaging approximately 50 feet in height and a cleared corridor ranging from 60-100 feet wide, the Project's collector line will result in lesser impacts than large 115-kV or 345-kV transmission lines.

would result in an unreasonable adverse scenic impact without the application of the traditional Site Law visual impact standard.[4] 35-A M.R.S.A. § 3452(2). In the case of the Project, the Department determined that the associated facilities were not of such an unusual scope, scale or location and accordingly applied the modified Wind Energy Act visual impact standard. See Appellants' Exhibit B (E-mail from Mark Margerum to Rufus Brown, Oct. 13, 2011). The Department made that determination because "the associated facilities are generally not visible from any scenic resource." Id.

The Department's finding regarding the minimal scenic impact of the Project's associated facilities is amply supported by the VIA. For example, ridgeline roads "will be screened by existing vegetation on either side of the road and would not be highly visible from outside the immediate area." VIA at 8. The Project's access road "should not be visible to the general public beyond its immediate intersection with Winter Hill Road." Id. The Project's substation will be screened by "heavy mixed vegetation." Id. at 9. Crane assembly areas "will be allowed to naturally revegetate." Id. The Project's operations and maintenance building will be located "at the back of an existing parking area" and "will have a dark roof and be painted a neutral color to minimize contrast with the surrounding vegetation." Id. at 10. Furthermore, the Project area is surrounded by "active commercial forestry operations" and contains "an extensive series of logging roads and skidder trails leading to log yards at the base of the mountain." Id. at 12.

Accordingly, the record demonstrates that Project's associated facilities are not of a scope, scale or location that would result in an unreasonable adverse impact and that the Department correctly determined that application of the modified Wind Energy Act visual impact standard was appropriate.

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[4] The Project's associated facilities include, at most, the approximately 7-mile 34.5-kV collector line, access roads, substation, and operations and maintenance building.

E. The Department Properly Assessed the Project's Cumulative Impacts

Under Maine law, the Department may only consider cumulative impacts based on existing and proposed development, and may not consider cumulative impacts based on speculative future development. See Hannum v. Bd. of Envtl. Prot., 2003 ME 123, 832 A.2d 765. The Appellants' claim that the Department did not adequately assess the Project's cumulative visual impacts with respect to other wind power projects is based on a flawed understanding of the required cumulative impacts analysis. The Appellants demand that the Board consider the impacts of speculative potential future development. However, the exact type of cumulative impact analysis urged by Appellants has been rejected by the Law Court as impermissible. In Hannum, the Law Court vacated a decision by the Board in which the Board denied a permit to construct a pier based on the belief that the pier, in combination with potential future piers for which no applications were pending, would result in undue adverse impacts to marine life and scenic uses. Id. ¶¶ 8-9. The Court held that:

> In sum, the finding of fact speculating that future development of other docks could have cumulative impacts causing [the applicant's] project to have an unreasonable impact on the environment at some unknown future time, even if it does not have such an impact now, is unsupported by evidence in the record and cannot support the portions of the Board's decision that rely on that finding.

Id. ¶ 17.

Furthermore, the following the Hannum decision the Department adopted guidance on the analysis of cumulative impacts, which calls for consideration of only existing, proposed and reasonably foreseeable development, not speculative development. See DEP Cumulative Impact Assessment Form, Doc. Num. DEPLW00630-A2004. Under Department guidance, cumulative impacts include "past, present and reasonably foreseeable future activities." The Department

defines the term "reasonably foreseeable future activities" as those activities that "will proceed or there is a high probability that they will proceed, i.e. valid permits have been granted for projects in the vicinity of the proposed project; projects are constructed or under construction, or; applications for permits to construct projects in the vicinity of the proposed project are currently under consideration." DEP Cumulative Impact Assessment Form at 14.

The Department's review of the Project's cumulative impacts was consistent with the Law Court's holding in Hannum and the Department's own guidance. SRW submitted a viewshed analysis of wind power projects that are operational, permitted or with pending applications that could potentially be seen from scenic resources of state or national significance within 8 miles of the Project. Department Order at 23; Letter from SRW to Mark Margerum, April 27, 2011 (attached as Exhibit 12). The only scenic resource located within 8 miles of the Project and any other operational or proposed wind power project is Halfmoon Pond, which is within 8 miles of the Record Hill Wind Project. However, due to intervening topography, there will be no visibility of the Record Hill Wind Project from Halfmoon Pond. Department Order at 23. Accordingly, the Department conducted the appropriate analysis of cumulative visual impacts and concluded that the Project would not result in any cumulative impacts.

The Appellants' contention that "the DEP needs to consider the impact of an initial project on the future development of the region" and that the Department erred because "it gave no analysis whatsoever to prospects that the approval of the Saddleback Ridge Project may be the harbinger for more wind projects in the future," Appellants' Brief at 38-39, is completely at odds with the Law Court's holding in Hannum, which explicitly prohibited the Board from making permitting decisions base on "harbingers" of future development. As a result, the Appellants' claims regarding cumulative impacts are without merit and should be denied.

F. The Board Does Not Have Jurisdiction to Hear Appellants' Constitutional Claims Regarding Visual Impacts and those Claims are Without Merit

The Board is an administrative agency of limited, statutorily-created jurisdiction and is without authority to rule on Appellants' claims regarding the Wind Energy Act's purported violation of Appellants' right to equal protection or the prohibition against unconstitutionally vague delegation of legislative authority. The Board's jurisdiction consists solely of that which is enumerated in its enabling statute, which does not confer authority to adjudicate constitutional claims. See 38 M.R.S.A. § 341-D. Although Maine Courts have not explicitly addressed the issue, the separation of powers doctrine prohibits an executive agency such as the Board from ruling on the constitutionality of statutes enacted by the Legislature. See, e.g., Fullerton v. Administrator Unemployment Comp. Act, 911 A.2d 736, 745 (Conn. 2006) ("it is well established that claims regarding the constitutionality of legislative enactments are beyond the jurisdiction of administrative agencies"); Dow Jones Co. v. Oklahoma Tax Comm'n, 787 P.2d 843, 845 (Okla. 1990) (administrative agencies are "powerless to strike down a statute for constitutional repugnancy . . . The power assigned to boards and commissions is not coextensive with that which is vested in the courts. Every statute is hence constitutionally valid until a court of competent jurisdiction declares otherwise."); Flores-Powell v. Chadbourne, 677 F. Supp. 2d 455, 463 (D. Mass. 2010) (holding that the federal Board of Immigration Appeals is without jurisdiction to adjudicate constitutional issues). Furthermore, as discussed below, Appellants' constitutional claims are entirely without merit.

1. The Wind Energy Act Scenic Impact Standard Contains Specific Objective Standards that Provide Qualitative Criteria to Guide Agency Determinations

Appellants claim that Wind Energy Act visual impact standards are unconstitutionally vague and do not permit meaningful review of project impacts, however the visual impact

criteria articulated in the Wind Energy Act are more specific, objective and qualitative than standards that the Law Court has previously upheld on void for vagueness challenges. Furthermore, even if the Wind Energy Act visual impact standards were unconstitutionally vague, the result of such infirmity is that the standards are unenforceable against an applicant and the Project license would be unaffected.

The Law Court recently addressed and rejected a void for vagueness challenge to the visual impact standard contained in the Natural Resources Protection Act. See Uliano v. Bd. of Envtl. Prot., 2009 ME 89, 977 A.2d 400. The standard in question in Uliano required that development "will not unreasonably interfere with existing scenic, aesthetic, recreational or navigational uses." 38 M.R.S.A. § 480-D(1). Landowners who were denied a permit by the Department claimed that the standard was unconstitutionally vague and an impermissible delegation of legislative discretion because the standard was "overly subjective and provides no guidance as to how much interference with scenic and aesthetic uses is permissible." Uliano, 2009 ME 89, ¶ 14. The Law Court disagreed and upheld the NRPA standard as sufficiently specific and definite to give meaningful guidance to both the Department and the applicants. Id. ¶ 32. In so doing the Court stated that "[o]bjective quantification, mathematical certainty, and absolute precision are not required by either the United States Constitution or Maine Constitution" and that "[i]n delegating decisionmaking authority to an executive agency, a statute need not provide determinate criteria as long as it offers an intelligible principle to which the person or body authorized to act is directed to conform." Id. ¶ 30 (internal quotations and citations omitted). The Court concluded that "[t]he operative terms contained in [the NRPA visual impact standard] render the statute susceptible to a logical construction that provides

meaningful guidance to both permit applicants and those who are duty-bound to administer it." Id. ¶ 32.[5]

In contrast to the terse NRPA standard found to be constitutional in Uliano (i.e. development shall "not unreasonably interfere with existing scenic, aesthetic, recreational or navigational uses."), the visual impact evaluation criteria contained in the Wind Energy Act are a model of specificity and definiteness:

> **Evaluation criteria.** In making its determination pursuant to subsection 1, and in determining whether an applicant for an expedited wind energy development must provide a visual impact assessment in accordance with subsection 4, the primary siting authority shall consider:
>
> A. The significance of the potentially affected scenic resource of state or national significance;
>
> B. The existing character of the surrounding area;
>
> C. The expectations of the typical viewer;
>
> D. The expedited wind energy development's purpose and the context of the proposed activity;
>
> E. The extent, nature and duration of potentially affected public uses of the scenic resource of state or national significance and the potential effect of the generating facilities' presence on the public's continued use and enjoyment of the scenic resource of state or national significance; and

[5] As pointed out by Appellants, one of the rationales for the Uliano Court holding that the NRPA existing uses standard was not impermissibly vague was that the Board was required to promulgate regulations to assist in implementing and interpreting the statutory standard. 2009 ME 89, ¶ 28. However, Uliano does not stand for the proposition that every statutory standard, even one as detailed and definite as the Wind Energy Act visual impact standard, requires promulgation of regulations to avoid unconstitutional vagueness. Appellants contend that the Governor's Task Force on Wind Power Development required the Department to adopt guidance to clarify the Wind Energy Act visual impact criteria. Appellant's support for this claim is the statement in Attachment M of the Report of the Governor's Task Force on Wind Power Development directing the Department to adopt guidance consistent with the approach described in Attachment M. Appellants' Brief at 18. Appellants' argument misses the fact that the entirety of Attachment M was enacted nearly verbatim by the Legislature as the statutory standard itself. Accordingly, the regulatory guidance sought by Appellants is readily available in the words of the Wind Energy Act visual impact criteria.

> F. The scope and scale of the potential effect of views of the generating facilities on the scenic resource of state or national significance, including but not limited to issues related to the number and extent of turbines visible from the scenic resource of state or national significance, the distance from the scenic resource of state or national significance and the effect of prominent features of the development on the landscape.
>
> A finding by the primary siting authority that the development's generating facilities are a highly visible feature in the landscape is not a solely sufficient basis for determination that an expedited wind energy project has an unreasonable adverse effect on the scenic character and existing uses related to scenic character of a scenic resource of state or national significance. In making its determination under subsection 1, the primary siting authority shall consider insignificant the effects of portions of the development's generating facilities located more than 8 miles, measured horizontally, from a scenic resource of state or national significance.

35-A M.R.S.A. § 3452(3).

Accordingly, Appellants' claim that these criteria are "too vague to permit meaningful review, violating the Separation of Powers Clause of the Maine Constitution," Appellants' Brief at 23, is a complete misreading of applicable precedent and should be denied.

Furthermore, even if the Wind Energy Act visual impact standards were held to be an impermissible delegation of authority, the result is that an unconstitutional regulatory standard cannot be enforced and an otherwise valid permit remains in effect. See Kosalka v. Town of Georgetown, 2000 ME 106, ¶ 17 (court holding municipal performance standard to be unconstitutionally vague and ordering municipal board to grant permit to applicant where all other permitting criteria were satisfied); Wakelin v. Town of Yarmouth, 523 A.2d 575, 576 (Me. 1987) (same); Cope v. Town of Brunswick, 464 A.2d 223, 227 (Me. 1983) (same).

2. The Wind Energy Act's Designation of Scenic Resources of State or National Significance Is Rationally Related to a Legitimate State Goal and Does Not Violate Appellants' Rights to Equal Protection

Appellants claim that the Wind Energy Act's limitation of consideration of scenic impacts on lakes in Maine's organized areas to 66 lakes that are listed as having significant or outstanding scenic value according to the State's 1989 Maine's Finest Lakes study is "so irrational, arbitrary and capricious as to be unconstitutional under the Equal Protection Clause." Appellants' Brief at 26. Appellants argue that "[t]hose who use and enjoy lakes in the organized towns not on the list are treated differently from those who use and enjoy lakes in the organized towns that are on the list." Id. While this may be true, such disparate treatment is wholly within the Legislature's authority and does not constitute a violation of Appellants' right to equal protection. See Friends of Lincoln Lakes v. Bd. of Envtl. Prot., 2010 ME 18, ¶¶ 27-30, 989 A.2d 1128 (Wind Energy Act's preclusion of Board assumption of original jurisdiction and preclusion of appeal to Superior Court for wind power development but not other development did not constitute violation of wind power opponents' equal protection rights).

Appellants have not suggested that they are members of a protected class (such as a racial minority) or that the visual impact standard they do not like implicates a fundamental constitutional right (such as life or liberty). As such, the challenged portion of the Wind Energy Act is reviewed under rational basis scrutiny. See Anderson v. Town of Durham, 2006 ME 39, ¶ 29, 895 A.2d 944, 953-54. Under rational basis review, "different treatment accorded to similarly situated persons need only be rationally related to a legitimate state interest." Id. (citation omitted). Furthermore, the statute bears a strong presumption of validity and "the burden is on the party challenging the government action to demonstrate that there exists no fairly conceivable set of facts that could ground a rational relationship between the challenged

classification and the government's legitimate goals." Id. (internal quotations and citations omitted).

The Wind Energy Act designates the 66 lakes identified in the State Planning Office's Maine's Finest Lakes study as having significant or outstanding scenic quality as the only lakes within the state's organized area that receive consideration of visual impacts resulting from expedited wind energy developments. 35-A M.R.S.A. 3451(9)(D)(1). The Legislature's designation of these 66 lakes as those deserving particular scenic consideration is rationally related (incorporating a relevant study conducted by a state agency with relevant expertise) to legitimate state interests (balancing the promotion of wind energy generation and the protection of scenic resources). Furthermore, contrary to Appellants' complaints regarding the purported incompleteness or inaccuracy of Maine's Finest Lakes study, Appellants' Brief at 24-26, the study is the result of a significant outlay of state resources and expertise. Just to classify lakes based on the criterion at issue here – scenic quality – the assessment started with a consideration of 867 lakes over 10 acres in size, identified lakes with high scenic potential based on a set of qualitative screening criteria, then every lake that met the minimum scenic standards was evaluated from the air and graded on a numerical ranking system based on six criteria. See Maine's Finest Lakes at 15-16, 28, 202-205.

Accordingly, under rational basis review, the classification of lakes under the Wind Energy Act does not amount to a deprivation of Appellants' equal protection rights.

II. THE PROJECT COMPLIES WITH THE DEPARTMENT'S NOISE STANDARDS

The Appellants' claims regarding Project noise impacts have been heard and rejected by the Board in numerous prior appeals and were addressed in detail during the Board's recently

concluded rulemaking on Chapter 375(10).[6] The current appeal presents no new information to the Board that would lead to a different result.

A. The Sound Modeling Used by SRW Has Been Validated and Proven to Over-Predict Sound Levels by Multiple Rounds of Rigorous Field Testing

The Appellants raise unsubstantiated theoretical concerns that Project's sound modeling does not represent worst-case scenarios because it does not account for wind shear and because there is insufficient evidence that noise reduced operation ("NRO") is effective. Appellants' Brief at 8-10. However, the overwhelming evidence demonstrates that the sound model and modeling assumptions used by SRW are a conservative predictor of the Project's sound levels. As discussed below, the modeling methodology that the Department approved has been empirically verified as accurate and conservative by sound measurements taken during field testing under worst-case conditions. The predictive modeling methodology used by SRW has also been vetted and approved by multiple peer reviews conducted by independent acoustical engineers. Furthermore, this Board has affirmed reliance on this modeling methodology in four prior appeals of wind power projects, and the Maine Supreme Court has affirmed the Board's conclusions regarding sound modeling in every wind power permitting appeal it has heard.

As Warren Brown of EnRad stated in his peer-review of the sound modeling for the Oakfield Wind Power Project, compliance monitoring at the Stetson I project demonstrated that the Department's wind power sound modeling protocol results in a "calibrated prediction model" that over-predicts wind turbine sound emissions at protected locations by 2-3 decibels. See

[6] As the Board is aware, the Chapter 375(10) rulemaking was initiated by a petition submitted by wind power opponents in December 2010. The process included several rounds of voluminous technical submissions, a public hearing on July 7, 2011 at which the Board received expert testimony from acoustical engineers and medical professionals, and numerous technical work sessions by the Board. The rulemaking resulted in the Board provisionally adopting wind power-specific noise regulations on September 15, 2011. The provisionally adopted rule will go to the Legislature for ratification during the legislative session starting in January 2012. As a result of the Board's exhaustive review of wind power sound impacts, the provisionally adopted wind power-specific sound rule imposes a daytime limit of 55 dBA and a nighttime limit of 42 dBA on wind power generating facilities.

Warren L. Brown, Oakfield Wind Project Amendment Sound Level Assessment – Peer Review, December 18, 2009, at 6. In conducting the Stetson I compliance monitoring, "[t]he data was rigorously evaluated using the Rollins Compliance Protocol methodology" to assess the accuracy of the predictive model. Id. Warren Brown determined that the Stetson I testing represented the "worst-case" scenario with respect to the shape of the turbine array, distance from turbines, topography, and meteorological conditions for sound propagation. Id. Even under these conditions, actual sound emissions at full power operation of the Stetson Wind Project were below predicted operating levels. Id.

In his June 15, 2011 peer review of post-construction sound monitoring at the Stetson II project, Warren Brown again confirmed that the Department's conservative wind power sound modeling parameters result in over-prediction of sound levels, this time by 3-4 decibels, even under worst-case conditions. See Warren L. Brown, Stetson II Operations Sound Testing Peer Review, June 15, 2011, at 6. The Stetson II testing "confirms sound pressure levels 3-5 dB below modeled levels." Id.

The sound modeling used by SRW and discussed in the RSG Sound Level Assessment employs the same or equally conservative modeling parameters as those discussed above. Accordingly, it has been conclusively demonstrated that the modeling parameters required by the Department for wind power projects result in maximum sound levels of 40-43 dBA at protected locations, even under worst-case conditions.

Furthermore, to the extent that Appellants claim that the Project's use of NRO calls into question the accuracy of the sound model, SRW submitted technical information from the turbine manufacturer demonstrating the effectiveness of turbine noise suppression during NRO.

See Attached SUBMISSION. Accordingly, Appellants' claims regarding the Project's sound modeling are without merit and should be denied.

B. Appellants' Health Claims Are Unfounded and Disregard Both the Effect of the Project's Conservative Modeling and the Applicable Regulatory Standard

Appellants claim that the Board should impose stricter sound limits on the Project because the Board recently concluded in the context of the Chapter 375(10) rulemaking that a 42 dBA nighttime limit is more protective of public health. Appellants' Brief at 10-15. However, as discussed above, the Project's conservative sound model overestimates noise impacts by 3-5 dBA. As a result, the Project's sound emissions will be within the nighttime sound limit established by the Board's provisionally adopted amendments to Chapter 375(10). In addition, at the same time the Board voted to reduce the nighttime sound limit, it also codified a less stringent modeling protocol that permits applicants to reduce modeling uncertainty inputs in recognition of the model's demonstrated over-prediction of sound emissions at operating wind power projects. The calibration of modeling parameters included in the provisionally adopted rule means that wind power projects permitted under the new rule will produce functionally similar sound levels as those projects permitted under the existing Chapter 375(10) limits coupled with highly conservative modeling assumptions.

Despite the Board's provisional amendment of Chapter 375(10), the applicable regulatory limit with which the Project must comply is the 45 dBA nighttime limit in effect at the time SRW's application was deemed complete for processing. See 1 M.R.S.A. § 302. Contrary to Appellants' urging, the provision contained in Chapter 375(10)(E) that authorizes the Board to "establish any reasonable requirement to ensure that the developer has made adequate provision for the control of noise" is not a license to circumvent the applicable numerical regulatory limit. In the case of wind power sound emissions, which have been the subject of intense scrutiny by

the Board through several appeals and the Chapter 375(10) rulemaking, adherence to the applicable numerical limits is itself assurance that the Project has made adequate provision for the control of noise.

Appellants state that Board should stop crediting "the tired arguments of wind developers that have not withstood scrutiny," Appellants' Brief at 11, but the facts and analysis regarding wind power sound and health impacts that have been relied on by the Department and wind power developers have been upheld in every administrative and judicial appeal in which they have been scrutinized. Appellants have presented no new or compelling evidence in this appeal and accordingly their claims regarding wind power sound should be denied.

C. The Board Does Not Have Jurisdiction to Hear Appellants' Constitutional Claims Regarding Sound Impacts and those Claims are Without Merit

As discussed above in Section I(F), the Board, as an administrative agency of the executive branch, does not have jurisdiction to hear Appellants' claims regarding purported violations of Appellants' constitutional rights to procedural and substantive due process stemming from the Department's regulation of wind power sound. Furthermore, Appellants' complaints amount to policy disagreements with the Department's regulation of wind power sound and do not identify any legal basis to invalidate SRW's license, let alone any violations of a constitutional dimension.

Appellants claim that the "DEP's rote approval of wind power projects with total disregard of the health consequences to neighboring residents" and "total disregard of the effect of its decision on the property values of abutting property owners constitutes the type of arbitrary, conscience shocking and oppressive conduct that violates substantive Due Process." Appellants' Brief at 8. Appellants also claim that they were deprived of procedural due process because the Department held a public meeting rather than a public hearing on the project and as a

result Appellants "were denied the right to present witnesses and the right to have their claims assessed by a neutral and impartial fact finder." Appellants' Brief at 6-7.

Appellants' claims are entirely unsupported by due process case law. First, Appellants have not identified a liberty or property interest protected by the Fourteenth Amendment that is implicated by the Department's approval of the Project. See Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 571 (1972); Gregory v. Town of Pittsfield, 479 A.2d 1304, 1307 (Me. 1984). "The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." Albright v. Oliver, 510 U.S. 266, 272 (1994). Appellants assert that their "bodily integrity" is at stake, Appellants' Brief at 6, but in the context of substantive due process the concept of bodily integrity is limited to protection against an assault on one's person, for example physical detention, corporal punishment or sexual molestation. See Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 451 (5th Cir. 1994). Accordingly, Appellants' claim that sound from a wind power facility constitutes an encroachment their 14th Amendment liberty interest in bodily integrity is misplaced. Appellants also claim that they possess 14th Amendment property interest in the value of their real estate, Appellants' Brief at 5-6, however this asserted right to property values must be independently established by statute or common law. See Roth, 408 U.S. at 577. Such a right against the diminution of the value of one's property does not exist under Maine law. As such, Appellants have not articulated any property or liberty interest implicated by the Project that is protected by 14th Amendment due process.

Second, the Department's purported "total disregard" for Appellants' health and property values in licensing a wind power project in compliance with a comprehensive regulatory regime is in a different universe from the egregious actions that rise to the level of

conscience-shocking constitutional violations of substantive due process. See DeShaney v. Winnebago Cty. Dept. of Social Svcs., 489 U.S. 189 (1989) (government agency's failure to act to protect child after learning that child was repeatedly beaten by his father and agency's inaction resulted in beating that left child brain damaged did not violate child's rights under the substantive component of the Due Process Clause). Even the cases cited by Appellants that are intended to support their substantive due process claim demonstrate the vast disparity between Appellants' allegations and the kind of state action that constitutes a violation of substantive due process. See, e.g., County of Sacramento v. Lewis, 523 U.S. 833 (1998) (holding that a police officer does not violate substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender); Coyne v. Cronin, 386 F.3d 280 (1st Cir. 2004) (dismissing substantive due process claim against FBI agent where FBI agent's negligence in handling confidential information resulted in informant receiving prison beating that knocked out informant's teeth).

Third, Appellants' claim that they were deprived of procedural due process because the Department did not hold a public hearing on the Project is devoid of legal support. The Law Court has held repeatedly that the Board and the Commissioner have discretion whether or not to hold a public hearing and the decision not to do so does not constitute legal error. See Concerned Citizens to Save Roxbury v. Bd. of Envtl. Prot., 2011 ME 39, ¶ 23 ("we see no reason to conclude that the Board abused its discretion or otherwise erred in denying [wind power project opponents'] request to conduct a public hearing on the ground that the record was adequately developed"); Martha A. Powers Trust v. Bd. of Envtl. Prot., 2011 ME 40, ¶ 10 ("Based on the record before it, the Board determined that a public hearing was not warranted [in appeal of wind power project approval], and we conclude that the Board did not abuse its

discretion in making this determination."). In other words, contrary to Appellants' suggestion that constitutional due process requires some fixed set of procedures, there is no legal requirement, either constitutional or otherwise, that compels the Commissioner or the Board to hold a public hearing.

In fact, as discussed above, the Department's review of the Project included significant input from Appellants and other interested parties, both in person at the Department's public meeting in Dixfield and through correspondence with Department staff. Throughout the Department's 10-month review of SRW's application, Appellants were represented by legal counsel and by visual and acoustical consultants who participated in the permitting process and submitted copious documentary evidence that was reviewed by the Department. Accordingly, Appellants' claim that the Department has violated their constitutional right to due process is without merit.

III. THE PROJECT COMPLIES WITH THE DEPARTMENT'S TANGIBLE BENEFITS STANDARDS

Appellants claim that SRW's payment of $60,000 to the Bureau of Parks and Lands for the purpose of public land acquisition as part of the Project's tangible benefits requirement "should not be allowed." Appellants' Brief at 41. Appellants state that the Project's contribution to BPL to help facilitate BPL's mission is "wrong" and constitutes "bribery." Id. These accusations are entirely unfounded. In making the contribution to BPL, in addition to making ongoing payments to the Project's host communities, SRW is simply complying with an applicable legal requirement. Under the tangible benefits standard contained in the Wind Energy Act, SRW is obligated to make contributions that will further statutory objectives such as natural resource conservation, local economic development and improvement of public infrastructure. 35-A M.R.S.A. § 3454. SRW has pledged to make these payments in good faith and does not

understand Appellants' reference to "bribery," particularly since the payment to which Appellants object is to BPL, an unrelated state agency that does not have jurisdiction over the Project.

Appellants do not contend that the Project has not complied with the statutory tangible benefits requirement. Indeed, the Project would likely comply with the statutory tangible benefits criteria even without the contribution to BPL. See Department Order at 45-46. The Appellants fail to identify any legal basis to invalidate the statutory tangible benefits requirement and furthermore the Board does not have the authority to disregard a statutory requirement duly enacted by the Legislature. Accordingly, it is unclear what relief Appellants are seeking but they have not provided the Board with any basis, legal or otherwise, to alter the Department's determination regarding the Project's demonstration of tangible benefits.

CONCLUSION

As demonstrated by the foregoing, the Appellants' claims are without merit and SRW respectfully requests that the Board DENY the request for a public hearing and AFFIRM the Department's Order.

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STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION

Saddleback Ridge Wind, LLC	)	
Carthage, Canton and Dixfield	)	SADDLEBACK RIDGE WIND, LLC
SADDLEBACK RIDGE WIND PROJECT	)	RESPONSE TO APPEAL
L-25137-24-A-N (Approval)	)	APPENDIX OF EXHIBITS
L-25137-TG-B-N (Approval)	)	

APPENDIX OF EXHIBITS

1. Project Map
2. Letter from Acting DEP Commissioner James Brooks to Rufus Brown, Jan. 21, 2011
3. RSG Noise Impact Study for Saddleback Ridge Wind Farm, October 2010
4. Memorandum from RSG to Andy Novey, December 20, 2010
5. Memorandum from RSG to Andy Novey, Feb. 23, 2011
6. RSG Noise Impact Study for Saddleback Ridge Wind Farm, Revised March 2011
7. Saddleback Ridge Wind Project – Noise Impact Study Peer Review, January 21, 2011
8. Saddleback Ridge Wind Project Visual Impact Assessment by Terrence J. DeWan & Associates, October 2010
9. VIA Supplement prepared by Terry DeWan and Associates, Jan. 13, 2011
10. Review of the Saddleback Ridge Mountain Wind Project Visual Impact Assessment by James F. Palmer, January 21, 2011
11. Review of the Saddleback Ridge Wind Project, Carthage, Maine: Wind Facility-Visual Quality and Scenic Character Report ("MLA Report") by James F. Palmer, January 21, 2011
12. Letter from SRW to Mark Margerum, April 27, 2011